Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
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(2)

No. 88-1285

In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

15 P

QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner violated the National Labor Relations Act by suspending and discharging an employee because of her union activities.

2. Whether substantial evidence supports the Board's finding that the affected employee did not act in a confidential capacity to anyone having the responsibility of formulating, determining, and effectuating labor policy for petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 62-85) enforcing in part and remanding in part the order of the National Labor Relations Board (the Board) is reported at 732 F.2d 754. The opinion of the court of appeals following the Board's decision on remand (Pet. App. 111-117) is unreported. The original decision and order of the Board (Pet. App. 1-6) and the decision of the administrative law judge (ALJ) (Pet. App. 7-57) are reported at 253 N.L.R.B. 1153. The Board's Supplemental Decision and Order (Pet. App. 96-110) is reported at 277 N.L.R.B. 1.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1988. A petition for rehearing was denied on

November 29, 1988 (Pet. App. 118). The petition for a writ of certiorari was filed on February 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that provides electric power to communities in Colorado. In early 1979,[1] petitioner's office employees began a campaign to obtain representation by the International Brotherhood of Electrical Workers, Local 111 (the Union). Pet. App. 7, 26. The Union held several meetings at the home of Katherine Tate, who had been hired some months earlier as secretary to Mike Deans, the director of petitioner's engineering department.[2] Tate solicited signatures on union authorization cards at the meetings and at work.

Tate's union activities were "common knowledge" to petitioner (Pet. App. 48, 50, 100) and "a source of discomfort" to her supervisor, Deans, who felt that they were incompatible with her duties as his secretary (*id.* at 49, 50). Petitioner unsuccessfully challenged Tate's inclusion in the bargaining unit, both before and after the union election, on the ground that she was a confidential employee (*id.* at 49). In late June, shortly after Deans had written a letter of recommendation praising Tate's work, Deans was instructed by a superior to keep track of errors in Tate's typing (*id.* at 48 & n.19).

On July 3, Tate was serving as relief switchboard operator in the reception area under the supervision of Spencer Cronk. Several employees were joking with Cronk at the

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[1] All dates referred to are in 1979 unless otherwise noted.

[2] Although she was primarily responsible to Deans, Tate's duties also included general clerical tasks for others in the engineering department, and filling in at the main switchboard when the operator was on breaks (Pet. App. 100-101).

time over a bag of spoiled food deposited in the area by an irate customer. After Cronk declined Tate's request that he remove the food, and Tate threatened to place the bag on his desk, Cronk invited Tate to "go ahead and have a wildcat walkout." Tate "started walking as if to leave the area" (Pet. App. 42), but returned to answer a call when the switchboard began to ring. She arranged for the trash to be removed and finished her shift. *Id.* at 41-42. Cronk left the area and continued to exchange jokes with employees about the spoiled food (Tr. 273-274, 569).[3]

Later that day, Cronk became "somewhat upset" over the incident and reported it to Deans, who informed Tate that she might be suspended. Pet. App. 42. On July 5, Cronk suspended Tate for three days for alleged "acts of insubordination and disrespect for your supervisor * * *." *Id.* at 43.

When Tate returned from her suspension on July 10, she presented to Deans a note from her doctor "strongly" recommending that she be given a one-week leave of absence "because of health problems" (Pet. App. 44). The note was referred to Stanley Lewandowski, petitioner's general manager, who called Tate's clinic to verify the note's authenticity, but "made no effort to speak with the doctor or otherwise ascertain the nature or seriousness of Tate's condition" (*ibid.*). Deans then denied Tate's request for leave, and stated that she would "probably be fired" if she failed to appear for work. Tate left work for one week. Upon her return, she was notified that she had been terminated "for being absent from work without proper authorization." *Id.* at 44-46.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner had

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[3] "Tr." refers to the transcript of the evidentiary hearing before the ALJ.

violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(3) and (1), by suspending and discharging Tate in retaliation for her union activities. Pet. App. 2, 49-53.

Relying on evidence of petitioner's opposition to the Union, Tate's union activities, and the instruction to Deans to "document any errors" in Tate's work, the Board found that petitioner "was intent upon building a case against Tate, giving colorable validity to a later imposition of sanctions" (Pet. App. 50). It observed that the spoiled-food incident had been viewed by all involved, including Cronk, as an occasion for "general merriment" that was not "of a seriousness warranting any kind of discipline," and held that petitioner's reliance on the episode was merely a "pretext to punish [Tate] for her union involvement" (*id.* at 50-51). Similarly, the Board found that petitioner had an "ulterior motive" for discharging Tate and that "the stated reasons for denying the leave of absence are unconvincing, indicating that the denial was in the expectation that Tate nevertheless would follow the doctor's recommendation[,] thereby presenting [petitioner] with a sure-fire chance to terminate her" (*id.* at 51-52).[4]

The Board rejected petitioner's defense that Tate was a confidential employee, noting earlier determinations to the contrary in the representation hearings (Pet. App. 49

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[4] Petitioner's stated reasons for denying Tate's sick-leave request were that Deans could not spare her because work had accumulated during her suspension, and that he and Lewandowski doubted Tate's sincerity in claiming a health problem (Pet. App. 44-45). The Board found that the backlog of work was not a legitimate reason for denying the request because it was created by petitioner's unlawful suspension of Tate (*id.* at 2 n.1). It found that any asserted doubt as to Tate's sincerity was unconvincing in light of Lewandowski's failure to inquire about Tate's medical condition during his phone call to Tate's clinic (*id.* at 51).

n.20). The Board concluded that, even if she were a confidential employee, she would still be protected by the Act against discrimination due to her union activities (*ibid.*).[5] It ordered that Tate be offered reinstatement with back pay and made whole for any loss resulting from her suspension and discharge (*id.* at 6).

3. The court of appeals found that substantial evidence supported the Board's findings with respect to Tate's suspension and discharge (Pet. App. 69-73). It upheld the Board's conclusion that petitioner's proffered reasons for its actions were pretextual and that petitioner's sole motive was to punish Tate for her union involvement (*id.* at 72). Accordingly, the court rejected petitioner's contention that the Board had erred by failing to state its findings in terms of the *Wright Line*[6] analysis applicable to dual-motive discharges (*id.* at 72-73). The court remanded to the Board for specific findings as to whether Tate was a confidential employee under the Board's "labor nexus" test, upheld by this Court in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981), and if so, whether she nonetheless would be protected by the Act (Pet. App. 78-79, 85).

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[5] The Board further found that petitioner had committed numerous other unfair labor practices and had violated Section 8(a)(3) and (1) of the Act by disciplining Kathleen Gunton, a union activist, who, at Tate's request, had attended the July 3 meeting in Dean's office (Pet. App. 15-34, 39-41, 52-53). On appeal, the court affirmed the Board's determination as to Gunton and enforced the Board's order with respect to the other violations (*id.* at 63-64, 79-85). Petitioner does not now seek further review of these rulings. See also n.7, *infra*.

[6] *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Petitioner's petition for a writ of certiorari was denied by this Court, No. 84-217 (Oct. 24, 1984).[7]

4. On remand, the Board reviewed the record evidence[8] in light of its "long-established test for determining whether an employee possesses confidential status," *i.e.*, whether that employee " 'assist[s] and act[s] in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.' " Pet. App. 106 (quoting *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956)). The Board noted that this "labor nexus" test had been endorsed by the Supreme Court in *NLRB* v. *Hendricks* "as an appropriate measure of confidential status" (Pet. App. 106). The Board explained that (*ibid.*):

> [u]nder this definition it is insufficient that an employee may on occasion have access to certain labor related or personnel type information. What is contemplated instead is that a confidential employee is involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding this policy before it is made known to those affected by it.

Applying this standard, the Board observed that Deans' duties were "inadequate to show personal responsibility or

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[7] Petitioner sought review by this Court of the Board's alleged failure, with respect to both Tate and Gunton, to apply the *Wright Line* analysis (Pet. 2). In its brief in opposition, the Board stated that, in light of the court of appeals' remand, the issue as to Tate was not yet ripe for review. Since petitioner made the identical argument as to both Gunton and Tate, the Board nevertheless addressed petitioner's contentions as to both employees. (84-217 Gov't Br. in Opp. at 8 n.8 and *passim*.)

[8] On remand, no party requested a further evidentiary hearing (Pet. App. 100 n.5).

regular involvement in the labor policy function," and that his relationship with Tate "fail[ed] to exhibit any evidence of * * * entrusting her with information relative to labor relations formulation" (Pet. App. 109).[9] Accordingly, the Board held that Tate had not been shown to be a confidential employee with a labor nexus, and reaffirmed its original decision (*id.* at 109-110).

5. The court of appeals agreed with the Board and enforced its order (Pet. App. 111-117). The court concluded that the Board's "elaboration" of its labor nexus standard, see *id.* at 112 (quoting *id.* at 106), was consistent with this Court's decision in *Hendricks,* and had a reasonable basis in law. The court found that substantial record evidence supported the Board's findings concerning the responsibilities of Tate's supervisors and Tate's relationship to

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[9] The Board discounted Tate's job description, revised during the time petitioner was contesting Tate's status, and a company memorandum describing Deans' responsibilities (written during the same period). It observed that the references in those documents to Deans' labor responsibilities and Tate's confidential tasks with respect to labor relations matters were unsupported by any other evidence, and were inconsistent with Tate's unrebutted testimony as to the nature of her relationship with Deans and the information to which she had access (Pet. App. 100-106). The Board also discounted testimony that Tate had allegedly typed "labor confidential" memoranda for Deans, noting that none of these memos had been offered in evidence. It also observed that the examples of her work that were introduced related almost without exception to petitioner's business operations, and that the only document in evidence bearing on "labor policy" had been typed by Tate at the request of Richard Prahl, a supervisory engineer who had no labor relations responsibilities, and who expressed his suggestions in an unsolicited, unprecedented, and never repeated memorandum (*id.* at 103-104, 107). In conclusion, the Board stated that "a single instance of note-taking at a management meeting and typing three memos of uncertain labor policy content simply are inadequate to provide a basis for finding that Tate served in a confidential capacity for [petitioner]" (*id.* at 109).

them, and its conclusion that petitioner had "failed [to meet] the 'labor nexus' test" (*id.* at 115). The court distinguished the finding of labor nexus confidentiality in *Prudential Insurance Co.* v. *NLRB,* 832 F.2d 857 (4th Cir. 1987), explaining that "the differences between the duties of the secretary and her boss here and those [of the secretary and the district manager] in *Prudential* are clearly sufficient to distinguish the results in this case" (Pet. App. 115-116).

ARGUMENT

1. Petitioner argues (Pet. 14-23) that the Board erred in failing to apply its method set forth in *Wright Line* for analyzing dual-motive discharges of employees engaged in union activity. This fact-bound contention was properly rejected by the court of appeals in a decision that does not conflict with the decisions of this Court or any other court of appeals.

In *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393 (1983), this Court approved the Board's allocation of proof set forth in *Wright Line* for determining the lawfulness of disciplinary action in dual motive cases. Under this approach, an employer who is shown to be motivated in part by anti-union animus can defend against an unfair labor practice charge by proving that "the worker would have been fired even if he had not been involved with the union." *NLRB* v. *Transportation Management Corp.,* 462 U.S. at 395.

A case is properly classified as "dual motive" if the employer has both valid and invalid reasons for disciplining an employee. However, not every case in which the employer asserts that its motive was legitimate requires formal analysis under *Wright Line.* The Board in *Wright Line*

recognized that "an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions," but will "generally advance what it asserts to be a legitimate business reason for its action." 251 N.L.R.B. at 1083-1084. Only if the evidence indicates that a legitimate economic motive contributed in part to the employer's decision must the Board then determine whether the employer's lawful reason would, in any event, have resulted in the discharge.

But where, as here, the employer's "asserted justification is a sham in that the purported rule or circumstance advanced * * * was not, in fact, relied upon[,] * * * the reason advanced by the employer may be termed pretextual." *Wright Line,* 251 N.L.R.B. at 1084. In such a case, "[s]ince no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." *Ibid.* The Board's finding in this case that the employer's asserted reasons for disciplinary action were pretextual obviates the need to engage in dual motive analysis under *Wright Line. Ibid.* See also *Limestone Apparel Corp.,* 255 N.L.R.B. 722 (1981), enforced, 705 F.2d 799 (6th Cir. 1982); *Babcock & Wilcox Co.,* 257 N.L.R.B. 707, 707 n. 1 (1981); *NLRB* v. *American Geri-Care, Inc.,* 697 F.2d 56, 63-64 (2d Cir. 1982) ("Once a finding of pretext is made, and is supported by substantial evidence in the enforcement proceeding, the adjudication is complete and neither the Board nor the Court need engage in the *Wright Line* analysis."), cert. denied, 461 U.S. 906 (1983); *NLRB* v. *Charles Batchelder Co.,* 646 F.2d 33, 38-39 (2d Cir. 1981) ("but for" analysis under *Wright Line* is unnecessary where "the Board found that the impermissible ground was the *only* basis for the Company's action and that the ostensible justifications offered by the Company * * * were merely pretextual") (emphasis

added); *The Artra Group* v. *NLRB,* 730 F.2d 586, 591-592 (10th Cir. 1984).[10]

Petitioner's argument that the Board erred by failing to apply *Wright Line* thus rests entirely on the claim that the Board's findings of pretext were not supported by substantial evidence. This factual issue does not warrant further review. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).[11]

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[10] As the Board in *Wright Line* recognized, "the distinction between a pretext case and a dual motive case is sometimes difficult to discern" because "the appropriate designation seldom can be made until after the presentation of all relevant evidence." *Wright Line,* 251 N.L.R.B. at 1084 n.5. Here, the Board made the "appropriate designation" by judging that the business reasons alleged by petitioner played *no* part in the decision and that petitioner's decision was entirely motivated by anti-union animus.

Thus, petitioner's contention that the "*Wright Line* analysis in dual motive cases * * * is *mandatory*" (Pet. 16 (emphasis in original)), misses the point. In finding that petitioner's asserted reasons were pretextual, the Board determined that, in fact, petitioner's *sole* motive was unlawful. No additional analysis was required to establish a violation of the Act. See *NLRB* v. *Transportation Management Corp.,* 462 U.S. at 398 ("it is undisputed that * * * if the reasons [the employer] proffers are pretextual, the employer commits an unfair labor practice").

[11] There is no merit in petitioner's contention that cases in other circuits conflict with the appeals court's decision (Pet. 16-23). With the exception of *Lawson Co.* v. *NLRB,* 753 F.2d 471 (6th Cir. 1985), the record in each case established that the employer actually relied on lawful reasons in taking adverse action against the employee. In *Lawson,* the court determined that the Board erred by relying exclusively on evidence of strong anti-union animus without analyzing the company's defense that it would have granted benefits even had there been no upcoming union election. In the instant case, in contrast, the Board fully considered petitioner's claim of a lawful motive and found that it was pretextual.

In addition, petitioner's reliance (Pet. 23) on cases in which this Court vacated and remanded for reconsideration in light of *Transpor-*

2. Petitioner contends (Pet. 25) that the court of appeals ignored "overwhelming evidence of labor nexus" in enforcing the Board's determination that Tate was not a confidential secretary. The Board found that Deans did not have "personal responsibility or regular involvement in the labor policy function," and, most important, did not "entrust[] [Tate] with information relative to labor relations formulation" (Pet. App. 109). Petitioner's quarrel with the Board's factual findings, upheld by the court of appeals (*id.* at 115), does not merit further review. *Universal Camera Corp.* v. *NLRB, supra.*[12]

Petitioner also cites the Board's decision in *B.F. Goodrich,* 115 N.L.R.B. 722 (1956), for the proposition that "it is sufficient that any employee may *on occasion* have access to certain labor related or personnel type information." See Pet. 27. In fact, the Board in that decision expressly repudiated a test for confidential status that encompassed those with mere access to labor relations information, and stated its "intention * * * to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity" to managers involved in labor policy. 115 N.L.R.B. at 724. The other cases cited by petitioner (Pet. 27-29) make clear that oc-

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tation Management Corp. is misplaced. In those cases, the courts of appeals had held the Board to a more stringent burden of proof than the *Wright Line* approach requires. Accordingly, after this Court approved the *Wright Line* standard, it granted the Board's petitions and directed the courts of appeals to apply the correct legal rule.

[12] Similarly, petitioner's assertion (Pet. 25-27) that the court of appeals improperly distinguished the facts in this case from those in *Prudential Insurance Co.* v. *NLRB,* 832 F.2d 857 (4th Cir. 1987), involves only the application of settled principles to particular facts, and presents no issue appropriate for consideration by this Court.

casional access to labor-confidential material does not satisfy the labor nexus test. See, *e.g., Hendricks,* 454 U.S. at 189 (test includes only those employees who "regularly have access" to labor-confidential information); *NLRB* v. *Allied Products Corp.,* 548 F.2d 644, 648-649 (6th Cir. 1977) (evidence showed that a secretary regularly typed all of the labor-relations paperwork generated by chief labor relations administrator).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

APRIL 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00200